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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 776

LAWRENCE J. LONG,
Plaintiff-Petitioner,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
a Corporation,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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The respondent, Illinois Central Railroad Company, submits this brief in opposition to the petition for certiorari in the above cause.

JURISDICTION.

Petitioners' suit does not present a case within the jurisdiction of the federal courts for reasons hereafter more particularly set forth.

QUESTIONS PRESENTED

1. Can a railroad employee who admittedly fails to meet physical requirements force a state court to assume jurisdiction to hear complaints of exercise of leniency to certain other employees where the law of the state requires exhaustion of administrative remedies of grievances based on labor contracts entered into pursuant to the Railway Labor Act?

2. Where both parties move for summary judgment thereby representing that no genuine issue of fact is presented and the trial court, Appellate Court and Supreme Court conclude as a matter of law, as permitted by statute and decision law of the forum state, that an admittedly physically disqualified employee was properly held out of service, can the employee now contend that fact questions exist for jury determination?

STATEMENT OF CASE.

The facts are that plaintiff, Lawrence Long, a locomotive engineer, on May 4 or 5, 1954 was disqualified for such employment by the defendant because the defendant earlier in 1954 in its regular quadrennial examination of all of its engineers and firemen discovered the plaintiff to have a disqualifying physical defect, namely, *defective color perception*.

The defendant by its Division Superintendent notified the plaintiff, both verbally and by letter, of the results of the defendant's physical examinations.

The results of the examinations by the defendant's examining physicians and surgeons are so clear and positive that there would seem to be no opportunity or ground for a reasonable dispute with respect to the facts as to whether or not the plaintiff was color blind, or had defective color perception.

It is undisputed that by the affidavit of one of the defendant's physicians and surgeons, Doctor William Murray of the Illinois Central Hospital located at 5800 Stony Island, Chicago, Illinois (Abst. 33, 34), the results of the examination of the plaintiff were as follows:

In the American Optical plate test consisting of 18 test plates and one demonstration plate, the plaintiff missed 10 of the 18 test plates;

In the Ishihara plate test consisting of 12 test plates and one demonstration plate, the plaintiff missed all 12 of the test plates;

In the HRR plate test consisting of 14 test plates plus three demonstration plates, the plaintiff missed 11 of the test plates;

In the Williams Lantern test consisting of 17 dif.

ferent lights in sets of three or 51 lights and an additional 17 lights which were examined through a small aperture, plaintiff missed 9 of the total 68 lights; and

In the Skeins test consisting of 20 skeins, plaintiff made 7 errors in selection of the skeins.

Doctor W. R. Marvel, the defendant's local physician at Clinton, Illinois, who made the initial examination of the plaintiff on February 27, 1954, found that the plaintiff was color blind and accordingly, thereafter, the plaintiff was re-examined at the hospital in Chicago on April 15, 1954 by Doctor Murray as above indicated.

The results of these tests set forth in the supporting affidavits to the defendant's motion for summary judgment are not disputed by the plaintiff. Plaintiff admits that he had previously discovered while he was in the army, he had defective color perception, but maintains his defect was a "slight congenital defect."

The affidavit of John F. Jackson, defendant's Ass't. Manager of Personnel (Addl. Abst. 14-15) states plaintiff had not been discharged as an employee, that he still receives the privileges as an employee and is being carried on the seniority roster.

The defendant's motion for summary judgment against the plaintiff and the plaintiff's motion for summary judgment against the defendant, the discovery depositions, the supporting affidavits and other documentary evidence attached to and submitted with the respective motions set forth a set of facts which is undisputed. In this posture the trial court decided there was no genuine issue as to any material fact between the plaintiff and the defendant as to the claim set forth in the plaintiff's amended complaint. The trial court denied the plaintiff's motion for summary judgment, sustained the defendant's motion for summary judgment and entered judgment in favor of the

defendant on the plaintiff's amended complaint in bar of action and for costs.

The defendant's motion for summary judgment (Abst 19-33) is supported by affidavits of Doctor William Murray, Doctor Ernest Olsen, Mr. E. H. Hallfoann, Director of Personnel for the defendant, and also a photostatic copy of Doctor Olsen's formal report attached as Exhibit A to Doctor Olsen's affidavit, which among other things found

> "Re-examination revealed he has defective color perception.
>
> "According to the standards specified in Operating Department Circular No. 18, he is disqualified.
>
> "In addition he also has defective vision but it will not be necessary to take this into consideration at this time, until *the* disqualifying defect is disposed of." (Italics supplied.)

The plaintiff in Paragraphs 12 and 13 of his amended complaint (Abst. 5, 6) quoted certain provisions of the contracts which he alleges to have been violated, and pursuant to which he instituted this action for damages.

The respective articles in those contracts have to do with *grievances and disciplinary matters*. There was no grievance or disciplinary charge made against the plaintiff by the defendant. The defendant has never made such a charge and the plaintiff in his discovery deposition and in his affidavits attached to his cross-motion for summary judgment against the defendant does not state any allegation, charge or fact that the defendant had discharged the plaintiff because of any disciplinary matter or grievance.

The plaintiff was advised as to the defendant's rules and regulations pertaining to his disqualifying defect and that he would be given a field test within five days after his request to his Division Superintendent for one. The plaintiff takes the flat position that he could not be required to take the defendant's field test which it had set up in ample

detail for the testing of vision and color perception of its locomotive engineers and firemen (Circular 18B, Addl. Abst. 25-33). The plaintiff resorts to scandalous and wholly unfounded charges that the field test would not have been given and administered fairly and honestly. Instead of requesting and taking the field test the plaintiff by his own admission within two or three days after receiving the Superintendent's letter of May 7 applied for his pension with the Railroad Retirement Board, urging in support thereof his physical defect which disqualified him from active service or employment by the defendant as a locomotive engineer, namely, defective color perception.

Illinois Central Railroad Operating Department Circular No. 18 is a management circular, copy of which is attached to the defendant's motion for summary judgment as Ex. 1 (Abst. 36). It sets forth the regulations and requirements governing physical examinations for employees, including Rule 10 outlining procedure upon examination disclosing defective color perception. There are no labor agreements that conflict with the provisions of said Circular 18 (Addl. Abst. 7). Circular 18B (Addl. Abst. 25) sets forth the regulations governing the conducting of field tests.

Dr. Murray testified on discovery deposition taken by the plaintiff that the plaintiff failed to pass, not only the Holmgren Worsteds tests, and the lantern tests, but all modifications of said tests. The defendant's answer to Interrogatory 22 propounded by the plaintiff states "That plaintiff's disqualification was based on the skeins tests, the lantern tests, the HRR plate test, the Ishihara plate test, and the American Optical plate test, all of which he failed to pass" (Abst. 52).

Plaintiff to date has refused to request a field test. He still holds seniority both as a locomotive engineer and as a locomotive fireman.

It is respectfully submitted that there is not a single material disputed fact in the record. The only real material issue in this case is did or did not the plaintiff have defective color perception. The answer in the record is an overwhelming Yes.

REASONS FOR DENYING WRIT.

I.

THE JUDGMENT OF THE TRIAL COURT AND THE OPINION OF THE APPELLATE COURT ARE BASED UPON ADEQUATE NON-FEDERAL GROUNDS.

(a) It Is the Law of Illinois that Entry of a Judgment Is Proper Where All the Material Facts Are Before the Court, the Issues Are Defined, Only a Question of Law Is Involved and Each Party Files a Motion for Summary Judgment.

This proposition is definitely settled by statute.—Sec. 57, Chap. 110, Illinois Revised Statutes, 1961, and the decision of the Illinois Supreme Court construing said section in *Allen v. Meyer*, 14 Ill. 2d 284; 152 N. E. 2d 576.

The judgment order entered by the trial court February 23, 1960 is as follows:

> "Now come the parties hereto, by their Attorneys, and the Court having heard the arguments and having examined all of the records, motions, depositions, affidavits, exhibits and files in this cause and being now fully advised thereon, overrules the motion of the plaintiff to strike portions of the answer of the defendant; and also the motion of the plaintiff for summary judgment against the defendant is denied; and the motion of the defendant for summary judgment against the plaintiff is allowed by the Court, and it is thereupon ordered by the Court that a summary judgment be and the same hereby is entered herein as prayed in the motion of the defendant, in favor of the defendant, Illinois Central Railroad Company, a corporation, and against the plaintiff, Lawrence J. Long, upon the amended complaint of the plaintiff, and the answer of the defendant thereto. * * *" (Abst. 125).

It will be noted that in reaching his decision the Court heard the arguments and considered all of the records, motions, depositions, affidavits, exhibits and files in the cause; that included among the motions was the motion of plaintiff for a summary judgment (Abst. 54-109) and the motion of defendant for summary judgment (Abst. 19-50).

This state of the record is almost exactly the same as the record before the Court in *Allen v. Meyer*, 14 Ill. 2d 284. There, too, the parties to the litigation filed their respective motions for summary judgment. On consideration of the respective motions the Court denied the defendant's motion and granted the plaintiff's motion. Affirming the Court's action and commenting on the procedure the Court said, page 291:

> "Before proceeding further, we should like to comment that the trial court's procedural handling of this case was correct beyond technical argument."

And continuing at page 292:

> "The Statute has since been amended to provide for the entry of summary judgment or decree in any proper case (Ill. Rev. Stat. 1957, chap. 110, par. 57). We regard this as a salutory development. Summary judgment procedure is an important tool in the administration of justice. Its use in a proper case, wherein is presented no genuine issue as to any material fact, is to be encouraged. The benefits of summary judgment in a proper case inure not only to the litigants, in the saving of time and expenses, but to the community in avoiding congestion of trial calendars and the expenses of unnecessary trials.
>
> "In the instant case both parties moved for summary judgment and thereby the court was invited to decide the issues by reference to its file. It is clear that all material facts were before the court; the issues were defined; and the parties were agreed that only a question of law was involved. In this view the parties were correct and the entry of summary decree for one

or the other was proper. *Reconstruction Finance Corp. v. Lucius*, 320 Ill. App. 57.

"The court properly treated each party's motion as being not only an application for summary decree, but a reply to the motion of his adversary. This was the proper interpretation under the circumstances. 'On the facts of this case, the affidavits of each party were presented not only in support of his own motion, but as a counter-affidavit opposing the motion of his adversary. Each party thereby admitted the sufficiency of his opponent's motion and supporting affidavit. *Grant v. Reilly*, 346 Ill. App. 399.'"

The filing by plaintiff of a motion for summary judgment is perforce a representation to the Court that there is no question of fact for a jury to pass upon. Plaintiff has had a trial with due process of law established under the public policy of the State of Illinois as indicated by its Constitution, statutes and judicial decisions.

(b) The Law of Illinois, as Recognized by the Federal Courts, Is That Plaintiff Is Barred from Pursuing His Remedy in Court Until He Has Exhausted His Administrative Remedies Under the Collective Bargaining Contracts of His Crafts Made in Pursuance of the Railway Labor Act.

Except for the negotiated agreements of the engineers, Ex. 2 (Abst. 37) and the firemen, Ex. 3 (Abst. 37) referred to in the plaintiff's amended complaint, there would be no basis for plaintiff's suit as defendant could have discharged him at will with or without cause. *Payne v. Pullman Co.*, 13 Ill. App. 2d 105, 118; 141 N. E. 2d 83. It is admitted that plaintiff failed to timely pursue the appeal steps outlined in Exs. 2 and 3 to finality. Because of the exclusive character of jurisdiction which has been vested in the National Railroad Adjustment Board under the Railway Labor Act, it is essential that any controversy must be proc-

essed to a complete termination. In *Pennsylvania Railroad Co. v. Day*, 360 U. S. 548, at 552 it is said:

> "Since the Board has jurisdiction, it must have exclusive primary jurisdiction. All the considerations of legislative meaning and policy which have compelled the conclusion that an active employee must submit his claims to the Board, and may not resort to the courts in the first instance, are the same when the employee has retired and seeks compensation for work performed while he remained on active service. A contrary conclusion would create a not insubstantial class of preferred claimants."

In *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 653, it is held that a discharged employee subject to the Railway Labor Act might bring an action in a state court for wrongful discharge *but in such action he must show exhaustion of his administrative remedies under his contract of employment provided the applicable state law so requires.*

That Illinois requires exhaustion of administrative remedies in order for plaintiff to sustain his alleged cause of action is clearly held in *Payne v. Pullman Co.*, 13 Ill. App. 2d 105; *McManaman v. Elgin Joliet & Eastern Railway Co.*, 25 Ill. App. 2d 449; *Anson v. Hiram Walker & Sons*, 222 F. 2d 100 (CA 7) and the Appellate Court in this case, *Lawrence J. Long v. Illinois Central Railroad Co.*, 32 Ill. App. 2d 103, appeal denied by the Illinois Supreme Court January 22, 1962.

In *Payne v. Pullman Co.* the plaintiff had been discharged for making advances toward a woman passenger. After stating at page 109:

> "The question of the right of an aggrieved railroad employee upon discharge to resort to the state courts for relief by way of damages for breach of contract has been the subject of litigation for some years, and three cases have quite definitely established the law.

Moore v. Illinois Central R. Co., 312 U. S. 630, 634; *Slocum v. Delaware L. & W. R. Co.*, 339 U. S. 239; *Transcontinental and Western Air, Inc. v. Koppal*, 345 U. S. 653, 654, 661."

the court stated at page 111:

"We must apply Illinois law to those questions."

and affirmed the Circuit Court's action dismissing the plaintiff's suit for failure to exhaust the remedies under the collective bargaining agreement of his union and the Railway Labor Act. This doctrine of exhaustion of remedies is well established under the law of Illinois. Under this court's holding in *Transcontinental and Western Air, Inc. v. Koppal*, it represents an adequate non-federal ground to support the judgment in this case.

II.

THE REQUIREMENT AS TO NOTICE AND HEARING IN SECTION 156 OF THE RAILWAY LABOR ACT APPLICABLE TO CHANGES IN COLLECTIVE BARGAINING AGREEMENTS NEGOTIATED PURSUANT TO SECTION 152 DOES NOT APPLY TO PHYSICAL STANDARDS SPECIFIED IN CIRCULAR 18 AND THERE ARE NO NEGOTIATED LABOR AGREEMENTS WHICH CONFLICT WITH THE PROVISIONS OF CIRCULAR 18.

Petitioner complains about the use of color perception tests other than the "woolen yarn" also known as Holmgren Worsteds tests stating that his color perception is the same right now as it has been from the date of his birth. He alleges that from 1923 up to January 1, 1954 Holmgren Worsteds was the only type of test administered to him or any other employee. That he always passed these tests satisfactorily. That all during this period of time, the color perception test administered to such employees was one contained in Circular No. 18 which reads as follows:

"The tests for color perception shall be made by the

Holmgren Worsteds or any standard modification thereof, and also by one of the several lanterns designated for this purpose" (Abst. 37).

At page 9 of his petition, citing Sections 152 and 156 of 45, U. S. C., the Railway Labor Act, he contends that Circular No. 18 could not be changed without notices and hearings provided by statute. This contention overlooks the uncontradicted showing in the record that said Operating Circular No. 18 is not a negotiated agreement embodied in the collective bargaining agreements contemplated by Section 152 (7th) or Section 156 but "is a management circular and there are no labor agreements that conflict with the provisions of the Circular." (Deposition of Hallmann, Add. Abst., Page 7.)

(a) As Plaintiff Was Unable to Pass the Holmgren Worsteds Skeins Test in 1954 His Claim Based on the Alleged Wrongful Additional Color Test Inaugurated in 1954 Falls of Its Own Weight.

It is significant that plaintiff ignores the requirement of Circular 18 that employees are required to pass the medical tests every four years.

Plaintiff's contention that he had passed satisfactorily ten former tests by use of Holmgren Worsted yarns ignores the uncontradicted fact that he did fail to pass that test at the regular quadrennial examinations in 1954. His contention necessarily means nothing if in fact plaintiff at the time of his disqualification could not pass the Holmgren Worsteds tests. The undisputed fact in this record is that on his examination on April 15, 1954, his color perception was in fact tested by the Holmgren Worsted yarns as well as by the lantern test which was also and for many years had been specifically named as proper in Circular 18. In the lantern test plaintiff missed 9 of 68 lights; in the

skeins (Holmgren Worsteds) test consisting of 20 skeins the plaintiff made 7 errors in selection of skeins. In answer to Interrogatory 22 propounded to the respondent by the petitioner it was stated, "Plaintiff's disqualification was based on the skeins test, the lantern test, the HRR plate test, the Ishihara plate test, and the American Optical plate test, all of which he failed to pass" (Abst. 52).

As the record clearly shows he was unable to pass the skeins test in 1954, at the time of his disqualification, his case, bottomed as it is on the alleged wrongful additional color test inaugurated in 1954, has fallen of its own weight.

III.

THE CONCLUSION OF THE APPELLATE COURT THAT PLAINTIFF WAS NOT DISCHARGED BUT DISQUALIFIED FOR SERVICE COINCIDES WITH THE RATHER UNIFORM INTERPRETATION APPLICABLE TO THE FACTS OF THIS CASE IN AWARDS OF THE FIRST DIVISION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD.

The Appellate Court in its opinion reported in 32 Ill. App. 2d 103 at page 110 it specifically found: "Here, the plaintiff was not discharged, but disqualified for service." This conclusion is consistent with the decisions in *McManaman* v. *Elgin, Joliet & Eastern Railway Co.*, 25 Ill. App. 2d 449, 167 N. E. 2d 448 and *Handley* v. *Illinois Central R. Co.*, 272 F. 2d 752 (CA 6). It is also consistent with the uniform interpretation of the First Division of the National Railroad Adjustment Board which is the division which decides disputes of those in plaintiff's craft of employment and interprets the bargaining agreements of that craft.

Obviously the requirements for good eyesight and color perception are much more stringent for members of the crafts involved in the First Division covering employees actually operating trains than in the remaining three di-

visions. As will be noted from the balance of Section 153(h) of 45 U. S. C., the Second Division involves machinists, boilermakers, etc.; the Third Division, station, tower, telegraph employees, etc., and the Fourth Division, employees of carriers directly or indirectly engaged in transportation of passengers or property by water, etc., and all other employees of carriers over which jurisdiction is not given to the First, Second and Third Divisions.

The First Division has decided on numerous occasions whether an employee has been discharged within the meaning of the collective bargaining agreement and the right and duty of a carrier to prescribe physical qualifications of its employees. The following are a few of those decisions holding that an employee held out of service because he does not meet physical standards has not thereby been dismissed or disciplined.

Brotherhood of Railroad Trainmen, Illinois Central Railroad Company, National Railroad Adjustment Board First Division, Award 16468, Docket 29272, 1953:

> "This division recognizes the right of the carrier to establish certain physical standards that all employes must meet. This is a just and proper rule, since the carrier is charged with the safety of the public, its employes, and its property."

Brotherhood of Locomotive Engineers, Southern Railway Company, National Railroad Adjustment Board First Division, Award 12730, Docket 23477, 1949:

> "The carrier was fully justified in not returning this man to duty until it appeared that he could perform his work with due regard for the safety of the travelling public. In such a case as this where there is reasonable doubt as to the condition of the eyes of an engineer it must be remembered that the safety of the public is paramount."

Brotherhood of Railroad Trainmen, Erie Railroad Company, National Railroad Adjustment Board—First Division, Award 13632, Docket 23390, 1950:

> "The union argued that an employee who was removed from service because of inability to meet physical standards had been, in effect, disciplined without being afforded a hearing as provided for in the discipline rule. The Division rejected this contention by saying, 'This is not a discipline case and the discipline rules with reference to reinstatement with pay for time lost are inapplicable.'"

Brotherhood of Railroad Trainmen, The New York Central Railroad Company—Buffalo and East, National Railroad Adjustment Board—First Division, Award 14218, Docket 23644, 1951:

> "Because of an accident, the claimant was unable to meet the physical standards established by the carrier. He was not allowed to work. The union contended that he had been dismissed in violation of the discipline and investigation rule. The Division rejected this contention saying, 'The discipline or investigation rule has no application to the facts of record in this docket, despite employes' contention to the contrary.'"

Switchmen's Union of North America, Southern Pacific Company (Pacific), National Railroad Adjustment Board—First Division, Award 16819, Docket 31663, 1954:

> "The claimant, after successfully contending that he had been permanently disabled, asked to be returned to service. The carrier said that he could not meet physical standards. The union argued that the claimant had been discharged in violation of the discipline rule. The Division denied the claim saying, in part: 'The rules with reference to discharges do not apply. Claimant has not been discharged or subjected to discipline but has been adjudicated to be no longer fit for duty.'"

Brotherhood of Railroad Trainmen, Lehigh Valley Railroad Company, National Railroad Adjustment Board First Division, Award 17154, Docket 32760, 1955:

> "The claimant was not allowed to work because he could not meet physical standards established by the carrier. The union contended that the claimant had been dismissed in violation of the discipline rule. This contention was rejected. The Division held, in part: 'Claimant has not been dismissed, as asserted in his claim. He is still carried on the seniority roster and is kept out of service because of physical disability.'"

Brotherhood of Railroad Trainmen, New York, Chicago and St. Louis Railroad Company, National Railroad Adjustment Board—First Division, Award 17156, Docket 32825, 1955:

> "The claimant was not allowed to work after it was discovered that he did not meet physical standards established by the carrier. His union argued that he was 'disciplined or dismissed without fair hearing' in violation of a rule in the collective bargaining contract. The Division rejected this contention holding: 'Claimant was not dismissed, nor was his application rejected. Therefore, those rules were not violated. He was disqualified because of his physical condition and there is no denial of his disability as reported by the general surgeon or of its being sufficient to disqualify him.'"

IV.

MOORE v. ICRR CO. AND OTHER CASES CITED BY PETITIONER DISTINGUISHED.

Based upon the theory that he is suing for damages for wrongful discharge plaintiff necessarily relies (Petn. 6) on *Moore* v. *ICRR Co.*, 312 U. S. 630; 61 S. Ct. 754; 85 L. Ed. 1089 (Brief 31, 37 *et seq.*).

We submit the *Moore* case does not give plaintiff the comfort he needs. In the first place, plaintiff is not dis-

charged. He still retains his seniority with the defendant as a locomotive engineer and as a locomotive fireman. He has not treated his employment at an end but has sought (in spite of his refusal to date to ask to be given a field test) to maintain his employee relationship throughout the dispute. *Moore*, of course, had no seniority at the time he filed suit. He had accepted his discharge as final. But the plaintiff here, even since the filing of the amended complaint, is still seeking "to be restored to duty" and restored to "the wages he has lost." Absent the employer-employee relationship he possesses no seniority. See Paragraph 6 of plaintiff's cross-motion for summary judgment (Abst. 54).

Both the question of restoration to duty and the question of wages he has lost are within the peculiar and exclusive jurisdiction of the National Railroad Adjustment Board. The difference between the situations as to employment relationship between the plaintiff here and *Moore* are substantial and constitute an insurmountable barrier to the application of the *Moore* case.

But another and even more formidable barrier to the application of the *Moore* case is the later U. S. Supreme Court case of *Transcontinental and Western Air, Inc. v. Koppal* (1952), 345 U. S. 653. That case removed the *Moore* case as an authority for a suit for wrongful discharge of a railroad employee in the State of Illinois by holding that the exhaustion of administrative remedies must be shown prior to a suit in court for wrongful discharge if the forum state requires such exhaustion.

The case of *Brotherhood of Railroad Trainmen v. Howard*, 343 U. S. 768, also referred to by plaintiff (Petn. 6) is not relevant here. This was a class action involving, as stated in the opinion by Mr. Justice Black at page 774, "the validity of the contract (bargaining agreement) not its meaning."

The case of *Del Bianco v. Pennsylvania Labor Relations Board*, 89 Atlantic (2d) 323, cited at p. 6 of plaintiff's petition and the other cases enumerated following it do not appear to govern the situation under the Railway Labor Act and the contracts here alleged to have been violated by the respondent.

CONCLUSION

In conclusion, we submit that no sufficient ground for certiorari has been presented. The petition should be denied.

Respectfully submitted,

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PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Now comes the petitioner, Lawrence J. Long, and, pursuant to Rule 58 (2), earnestly prays this Court for a reconsideration and rehearing of his Petition for Writ of Certiorari and says:

1. That at the time this Court had the said matter under advisement, its consideration was limited solely to the Petition for Writ of Certiorari and the Answer thereto.

2. That in the said Answer there were factual errors and misapprehensions as to Illinois law which well could have misled this Court as to the nature of the controversy and as to the nature of certain of the issues presented.

3. That said Answer was not received by counsel for petitioner, because of his absence from the jurisdiction, until April 20, but that a Reply was immediately prepared,

printed and transmitted to the Clerk by the printer upon April 23; that unfortunately this Court did not have that Reply with its corrections of matters in said Answer before it for its consideration when acting upon the Petition; that leave should be given to the Clerk to distribute such Reply briefs for the consideration of this Court.

4. That if the Illinois decision in this case is permitted to stand, it would destroy for all purposes a judicial remedy in wrongful discharge cases since an employer, by filing an affidavit and seeking summary judgment, could effectively eliminate a jury passing upon the credibility of those persons whose affidavits were so submitted.

DISCUSSION.

The errors contained in the Answer of the defendant railroad company are discussed at greater length in the Reply Brief heretofore submitted to this Court. Among other matters, it points out that the Jackson affidavit was no part of the pleadings and had, in fact, been waived by the defense; that Illinois law does not, as stated in such Answer, prohibit a jury from passing upon the credibility of a witness such as Dr. Murray *unless both sides agree upon the facts* which is not true here; and that the plaintiff did in the trial court, contrary to defense assertions, seek a remedy for wrongful discharge and seek actual and punitive damages therefor. It is our sincere belief that this Court, not having the benefit of the Reply Brief, has been misled by the assertions of the Answer into believing that no justiciable controversy was presented for its consideration.

PRAYER FOR RELIEF.

Wherefore, petitioner prays that this Court grant a rehearing upon the petition for writ of certiorari and direct the Clerk to distribute the Reply Briefs for this Court's

consideration; and that upon such further consideration this Court order a writ of certiorari to issue to the Appellate Court of Illinois and that such further proceedings may be had as justice may require.

Respectfully submitted,

LAWRENCE J. LONG, Petitioner, by

JOHN ALAN APPLEMAN,
Of Counsel.

JOHN ALAN APPLEMAN,
DWIGHT H. DOSS,
JO B. GARDNER,
Attorneys for Petitioner.

State of Illinois, } ss.
County of Champaign. }

Certificate of Counsel.

John Alan Appleman, being first on oath duly sworn, states that he is a licensed practicing attorney admitted to practice in this Court; that the foregoing petition is presented in good faith and not for delay; that the petition is restricted to the grounds above specified.

John Alan Appleman.

Subscribed and sworn to before me this 5th day of May, 1962.

Constance Allison,
Notary Public.